IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.A.ABDUL GAFOOR
&
THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

THURSDAY, THE 25TH JANUARY 2007 / 5TH MAGHA 1928

Mat.Appeal.No. 177 of 2006()

OP.1295/2005 of FAMILY COURT,ERNAKULAM
.....

PETITIONER: APPELLANT/RESPONDENT:

S. PRABHU, AGED 33 YEARS,
S/O SHAN;MUGHA SUNDARAM PILLAI. S.,
NO.72 RAM NAGAR, KUMARASWAMI PETTI,
SALEM 7, TAMIL NADU.

BY ADV. SRI.MOHAN JACOB GEORGE
SMT.P.V.PARVATHI
SMT.REENA THOMAS
SRI.AJESH. M.R.

RESPONDENTS:

RAJANI R., D/O. A. RAJAGOPALAN,
NANDINI MUTTATHU, DARSANAM ROAD,
SUVARNA NAGAR, OPPOSITE TO POTTAYIL TEMPLE,
EROOR SOUTH, ERNAKULAM DISTRICT, NOW RESIDING
AT MINEST, DARSANAM ROAD, SUVARNA NAGAR,
EROOR SOUTH, ERNAKULAM DISTRICT.

BY ADV. SRI.A.BALAGOPALAN
SRI.BASIL MATHEW

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 25/01/2007, ALONG WITH WPC NO. 17498 OF 2006 RP NO. 824 OF 2006 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.A.ABDUL GAFOOR &

K.R. UDAYABHANU, JJ.

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M.A.NO. 177 OF 2006&

W.P.(C)NO. 17498 OF 2006

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DATED THIS THE 25TH DAY OF JANUARY 2007

JUDGMENT

Abdul Gafoor,J.

The appellant and the petitioner is one and the same. He will be described in the judgment as the husband. He got married with the respondent in the appeal, who will be hereinafter described as the wife, at Bodinaikannur in Tamil Nadu. It is also common case that both of them were residing in Tamil Nadu until recently till June 2005. Minor Rishiraj was born to them while they were residing in Tamil Nadu on 1-11-1999 at Bodinayakannur.

2. The relationship between the two got strained. After that the wife came to Ernakulam when the husband had an intention to go abroad. According to her she was taken by him to her parents in Ernakulam. But the husband later dropped the

idea to go abroad and remained in Tamil Nadu and the wife in Ernakulam along with her parents, who were residing along with her brother. Accordingly as she continued residence at Ernakulam, she admitted the minor child in a school in Tripunithura nearby her residence on 8-5-2006 when the academic year 2005-06 commenced. According to her, the child was taken from the school by the husband on 8-11-2005. Therefore, she filed O.P.No. 1295/2005 invoking Section 25 of the Guardian and Wards Act before the Family Court, Ernkaulam seeking to appoint her the guardian of the minor child and seeking interim custody of the child. There were directions to produce the child. But those directions were not complied with by the husband. Finally, the direction was challenged before this Court by the husband. The child was produced by the husband before this Court and this Court directed the child to be taken before the Family Court. The Family Court passed an order giving custody of the child to the wife. That was on 13-3-2006. In the meantime the case before the Family Court was set ex parte against the husband. The order was put in execution and

there was an order on the execution side handing over the child to the custody of the wife. It was thus the child came into the custody of the wife on 13-3-2006. That custody is continuing even now. Faced with the situation the husband moved to set aside the ex parte order. It was allowed on 10-4-2006.

3. The contention of the husband was that Family Court, Ernakulam did not have jurisdiction as the ordinary residence of the child has to be looked into for the jurisdiction purpose in terms of Section 9 of the Guardian and Wards Act, 1890. That the ordinary residence of the child was in Tamil Nadu as the couple were living in Tamil Nadu and the ordinary resident of the husband is in Tamil Nadu. But the jurisdiction aspect is answered against the husband. That order is impugned in the Mat Appeal. There was also an order of interim custody of the child in favour of the wife. It is under challenge in the writ petition. Therefore, we have to consider the issue regarding the jurisdictional aspect.

4. Whether the child was ordinarily residing in Tripunithura or not was the matter in issue to be considered

further. It is an admitted fact by both sides that the residence of the wife in Tripunithura is of a recent origin as their marriage took place in Tamil Nadu and as they resided after marriage in Tamil Nadu and the child was born to them in Tamil Nadu and as until June 2005 they were living together in Tamil Nadu. She came here even according to her own showing when her husband had a plan to go abroad. The reason was that her parents were in Tripunithura where her brother was staying for his employment purpose.

5. The ordinary residence of the child can be the ordinary residence of the either of the parents as well in a situation where both the parents are living apart. Therefore, whether Tripunithura in Ernakulam is the ordinary residence of the wife is a matter in issue to be considered. To find out whether the court in Ernakulam is having jurisdiction. She came here to reside in Tripunithura, Ernakulam recently . Is it her ordinary residence is a matter to be looked into by taking evidence as she claims that her paternal relations are in and around in Tripunithura in Ernakulam. But now, there is no evidence on

record at all in that regard. The Jurisdictional aspect arising in this case has to be decided after adducing evidence on that fact. Then there is no point in directing the Family Court to gather evidence on jurisdictional aspect alone because the very purpose of the establishment of the Family Courts and the enactment of the Family Courts Act is to resolve the matrimonial dispute at the earliest. Therefore, the Family Court shall take evidence on jurisdictional aspect as well as on the merit of the claim. Therefore, setting aside the order impugned in the appeal, we direct the Family Court to try O.P.No.1295/2005 and to decide the jurisdictional aspect and dispose of the same on merits, in case it is found that there is jurisdiction for that court to decide the main issue.

6. True there was a contention from the side of the appellant that the petition itself was not maintainable and that maintainability was a matter that connecting the jurisdictional aspect. It is contended that a petition under Section 8 of the Guardians and Wards Act will be maintainable by a mother only with specific averment that the father is unfit to be a guardian.

There is no such averment and therefore, the petition was not maintainable. A thorough and complete reading of the impugned order will reveal that the court below was looking into the territorial jurisdiction of the court and not as to the maintainability or the jurisdiction to grant a relief. Necessarily that is also a matter to be looked into by the court when the final order is to be passed.

7. With regard to the interim custody impugned in W.P.(C) No.17498/2006, we have already made certain arrangements enabling the husband to have access the child. That arrangement shall for the time being continue until the Family Court modifies the order upon the application by either parties pointing out any change in situation or circumstance. We make it clear that during first half of every vacation for the school, the child shall be allowed to stay with the father. As regards long vacation it shall be the first April to 30th April. The aforesaid modification is made as regards the order impugned in the petition. In any other respect, the order in force shall be followed. As an exceptional case on 27th & 28th of January 2007,

the mother can keep the child in her custody. The interim custody of the child as now ordered will not weigh with the Family Court in deciding the issue in question finally. The orders passed regarding the custody as above will replace the order impugned in the writ petition. The appeal and writ petition are disposed of as above.

Sd/-

K.A.ABDUL GAFOOR
JUDGE

Sd/-
K.R.UDAYABHANU,
JUDGE

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